

AO 243 (Rev. 5/85)

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODY

<b>United States District Court</b>		District MASSACHUSETTS
Name of Movant EDGARDO COLON	Prisoner No. 22968-038	Case No. 00 CR 10029-NG
Place of Confinement FCI LEWISBURG		

04 10 280 NG

UNITED STATES OF AMERICA                      v.    EDGARDO COLON, ET AL  
(name under which convicted)

**MOTION**

1. Name and location of court which entered the judgment of conviction under attack \_\_\_\_\_  
UNITED STATES DISTRICT COURT, BOSTON, MA
  
2. Date of judgment of conviction JUNE 27, 2002
  
- 3 Length of sentence 188 MONTHS
  
4. Nature of offense involved (all counts) \_\_\_\_\_  
Defendant was charged with two substantive counts of possession with intent to distribute heroin and one count of ~~conspiracy to possess with intent to distribute heroin~~
  
  
5. What was your plea? (Check one)  
 (a) Not guilty                      ☐  
 (b) Guilty                            ☒  
 (c) Nolo contendere              ☐
  
- If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:  
 Defendant pled guilty to Counts Three and Nine and not guilty to Count One of the Indictment, which was the ~~conspiracy count. Defendant took responsibility for his conduct but refuted the amount of heroin specified in Count One (over 100 grams) and argued that more than one conspiracy had been charged.~~
  
  
6. If you pleaded not guilty, what kind of trial did you have? (Check one)  
 (a) Jury                                ☐  
 (b) Judge only                       ☐
  
7. Did you testify at the trial?  
 Yes ☐ No ☐
  
8. Did you appeal from the judgment of conviction?  
 Yes ☐ No ☐

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9. If you did appeal, answer the following:

(a) Name of court First Circuit Court of Appeals

(b) Result Voluntary dismissal.

(c) Date of result 10/8/02

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

Yes ☐ No ☒

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of court \_\_\_\_\_

(2) Nature of proceeding \_\_\_\_\_

(3) Grounds raised \_\_\_\_\_

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result \_\_\_\_\_

(6) Date of result \_\_\_\_\_

(b) As to any second petition, application or motion give the same information:

(1) Name of court \_\_\_\_\_

(2) Nature of proceeding \_\_\_\_\_

(3) Grounds raised \_\_\_\_\_

i

Yes ☐ No ☐

(6) Date of result \_\_\_\_\_

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

[illegible]

CAUTION If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(b) Conviction obtained by use of coerced confession.

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- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: Defendant was denied due process at sentencing and resulted in miscarriage of justice.

Pursuant to Fifth and Fourteenth Amendments to US Constitution

Supporting FACTS (state *briefly* without citing cases or law) \_\_\_\_\_

Defendant pled guilty to two substantive counts of heroin distribution, but refused to plead guilty to the conspiracy count because he did not believe that the evidence would support a conclusion that he was responsible for a 100 grams or more of heroin by a preponderance of the evidence. The sentencing court found that the defendant was responsible for more than 1000 grams primarily based upon the testimony of a cooperating witness (Guzman) and the factual basis for guilty pleas sworn to by two co-defendants which attributed over 1000 grams of heroin to defendant. Defendant submitted during the hearing that Mr. Guzman was unreliable and that the guilty pleas by Pagan and Cruz were also unreliable as they were driven by the threat that Guzman would testify that they sold the amounts of heroin contained in each co-defendant's sworn colloquy. The new evidence focuses entirely on the post sentencing revelations by the government that Mr. Guzman not only lied to them... (See Attachment "A")

B. Ground two: \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

C. Ground three: \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

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D. Ground four: \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: \_\_\_\_\_

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?  
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing James Budreau, 20 Park Plaza, Suite 905, Boston, MA 02116

(b) At arraignment and plea Same

(c) At trial \_\_\_\_\_

(d) At sentencing Same

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(e) On appeal Pro se.(f) In any post-conviction proceeding James Budreau was appointed by this Court.(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

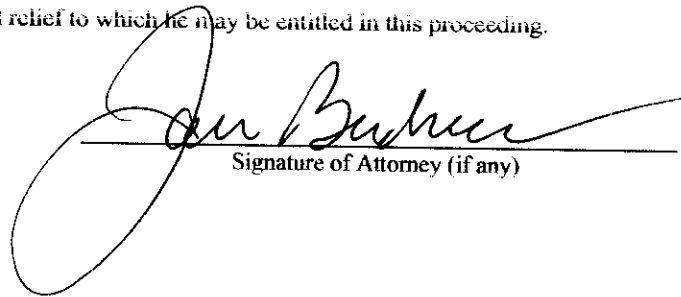
(a) If so, give name and location of court which imposed sentence to be served in the future: \_\_\_\_\_

(b) Give date and length of the above sentence: \_\_\_\_\_

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?


Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

  
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

X 11-4-03  
(date)

  
Signature of Movant

ATTACHMENT A

Ground One:

Supporting Facts (Continued):

...before the defendant's sentencing but also committed sworn perjury on the stand during defendant's sentencing hearing. This perjury included Guzman's failure to reveal the following under direct or cross examination:

1. That he smoked an excessive amount of marijuana on a daily basis and snorted cocaine a few times a week during the period in question;
2. That he had been selling cocaine for at least ten years as well as at the time that he was testifying against the defendant;
3. That he had committed an armed robbery of a marijuana dealer just two months before he testified against defendant.

This perjury was material for many obvious reasons including the following two. First, if Guzman had been honest then defendant believes it would have caused the Court to conclude that he was exceptionally unreliable because: (a) his excessive drug use (unknown to the Court) had undermined his perceptions of past events and (b) his ongoing criminal activity, which was extremely serious and unknown to anyone, would have induced him to lie in order to gain benefits from the government. Second, Mr. Guzman's willingness to lie under oath about his excessive drug use and serious criminal history means that he would lie about the amount of drugs that he observed being sold by defendant, his co-defendants Pagan and Cruz and others. Mr. Guzman's willingness to commit perjury completely undermines the value of his testimony at sentencing and his earlier statements to the government that were used to induce co-defendants Pagan and Cruz to falsely admit that they sold (in total) approximately 1000 grams of heroin in concert with defendant. If Guzman's testimony and the factual basis for Pagan/Cruz' plea s are excised, this Court would have found that by a preponderance of the evidence that defendant was responsible for less than 1000 grams and possibly less than 100 grams.

4. The evidence described above was produced by the United States Attorney's Office in March 2003. See Letter and DEA 302's attached as Attachment B.

5. The supporting grounds for this Petition are more fully described in Petitioner's Memorandum of Law attached by reference and incorporated by reference.

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

EDGARDO COLON  
Petitioner

v.

UNITED STATES  
Respondent

04 10 280 NG

Civil Action No.:

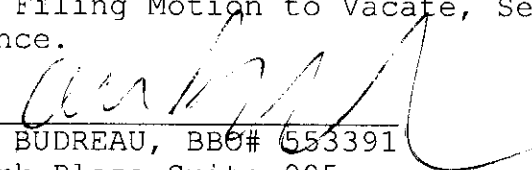
Crim. No. 00-CR-10029-NG

04 10 280 NG

**CERTIFICATE OF SERVICE**

I, James Budreau, hereby swear under pains and penalties of perjury that the following documents were served upon AUSA John Wortmann at One Courthouse Way, Boston, MA by hand on this 10<sup>th</sup> day of February 2004:

- (1) Motion to Vacate, Set Aside or Correct His Sentence;
- (2) Memorandum in Support; and
- (2) Motion to Appoint Counsel to Represent Mr. Colon...and Waive Filing Fee for Filing Motion to Vacate, Set Aside or Correct His Sentence.

  
JAMES BUDREAU, BBO# 653391  
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